Filed 11/20/15 In re Dozier CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re ANTOINE DWAYNE DOZIER,	
on Habeas Corpus.	E061336
	(Super.Ct.No. RIF1103080)
	OPINION

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Patrick F. Magers, Judge. (Retired judge of the Riverside Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.). Petition granted.

Michael Bacall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Quisteen S. Shum, Deputy Attorney General, for Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

A jury convicted petitioner Antoine Dwayne Dozier[1] of two counts of robbery (Pen. Code[2], § 211), two counts of second-degree burglary (§ 459), and active participation in a criminal street gang (§ 186.22, subd. (a)). The jury also found true the special allegations that Dozier participated in each of the robberies and burglaries as a principal with knowledge that another principal was armed with a firearm (§ 12022, subd. (a)(1)), and that he committed all crimes but the count for participation in a criminal street gang for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)).

Prior to sentencing, petitioner admitted he had both a 2001 carjacking conviction that counted as a serious felony strike conviction and a 2004 conviction for petty theft with a prior theft-related conviction. (§§ 667, subds. (c) & (e)(1), 667.5, subd. (b), 1170.12, subd. (c)(1).) The trial court sentenced Dozier to an aggregate term of 26 years. It reached this sum by imposing the upper term of five years on the first robbery count, doubled under the three strikes law, with a one-year enhancement for firearm use (§ 12022, subd. (a)) and a 10-year enhancement because the crime was committed to

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[1] The jury also convicted a codefendant, Scyler Lee Wilkerson, of similar offenses. Petitioner and Wilkerson appealed, arguing that insubstantial evidence supported certain gang-related convictions and enhancements. We ordered the writ petition considered, but not consolidated, with the appeal and decide the two matters separately. The facts are taken from the opinion of said appeal. (*People v. Dozier* (July 22, 2015, E060059) [nonpub. opn.].)

[2] Unless otherwise specified, all statutory references are to the Penal Code.

benefit a gang (§ 186.22, subd. (b)). The court then added a five-year prior serious felony enhancement because of the carjacking prior (§ 667, subd. (a)(1) (section 667(a)(1))). The sentences on the remaining counts were stayed (§ 654), stricken, or ordered to run concurrently.

In this habeas corpus proceeding, petitioner argues his trial attorney rendered ineffective assistance of counsel because the 2001 carjacking case resulted in a juvenile adjudication rather than a "conviction" (§ 667(a)(1)), but counsel failed to object because he did not know that a juvenile adjudication cannot be used to support a prior serious felony enhancement under section 667(a)(1). We requested an informal response, which the People provided. Therein, they concede that a juvenile adjudication cannot support the section 667(a)(1) enhancement. Because the law supports the People's concession, and we can discern no reason for counsel not to have objected to the section 667(a)(1) sentencing enhancement, we grant the relief petitioner seeks.

DISCUSSION

Petitioner's claim of ineffective assistance requires a showing, first, "that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." (*People v. Cooper* (1991) 53 Cal.3d 771, 831 (*Cooper*).) Petitioner argues any reasonable trial attorney would have known that his juvenile adjudication for carjacking could not support a prior prison enhancement under section 667(a)(1) and, therefore, had a duty to tell the trial court as much prior to sentencing. For

the reasons stated *post*, we agree that a juvenile adjudication cannot support the five-year enhancement defendant received for having a prior serious felony.

Section 667(a)(1) states, as relevant: "any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately." It is undisputed that petitioner was found to have committed a crime that qualifies as a "serious felony," namely carjacking (§§ 667, subd. (a)(4), 1192.7, subd. (c)(27)), before he was convicted of the crimes charged in this case. Logically, then, the section 667(a)(1) enhancement would seem to apply.

However, significant tension arises when we look beyond the text of Penal Code section 667(a)(1) itself. For example, Welfare and Institutions Code section 203 reads: "An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding." Furthermore, numerous cases have explained that juvenile delinquency proceedings and adult criminal prosecutions are different in kind, such that the former do not qualify as convictions. (See, e.g., *People v. West* (1984) 154 Cal.App.3d 100, 107-108 (*West*) ["A distinction is made between criminal convictions and juvenile adjudications because of the fundamentally different purposes the two bodies of law are designed to serve"]; *In re Joseph B.* (1983) 34 Cal.3d 952, 955

[“minors charged with violations of the Juvenile Court Law are not ‘defendants.’ They do not ‘plead guilty,’ but admit the allegations of a petition. Moreover, ‘adjudications of juvenile wrongdoing are not “criminal convictions.” ’ ”].) Because of these differences between a juvenile adjudication and the conviction of an adult, the *West* court squarely held that the section 667(a)(1) enhancement, which requires a “conviction,” cannot be applied to a defendant on account of a juvenile adjudication. (*West*, at pp. 106-110; see *People v. Smith* (2003) 110 Cal.App.4th 1072, 1080, fn. 10 [citing *West* for proposition that “juvenile adjudications cannot be considered . . . a prior serious felony conviction for purposes of the mandatory five-year enhancement in section 667, subdivision (a)”].)

The very text of section 667 provides further support for this conclusion. Subdivision (d)(3) of section 667 allows a juvenile adjudication to “constitute a prior serious and/or violent felony conviction for purposes of sentence enhancement” under certain circumstances. However, that definition of “prior conviction of a serious and/or violent felony” only applies to subdivisions (b) through (i) of section 667. (§ 667, subd. (d).) Consequently, nothing in section 667 disrupts the ordinary rule that a juvenile “adjudication” is not the same thing as a “conviction.” In addition, the decision to include juvenile adjudications within the definition of the term “conviction” for some purposes related to sentencing, but not to all such purposes, in fact strengthens petitioner’s contention; “[g]enerally, under the principle of *expressio unius est exclusio alterius*, ‘ “the expression of certain things in a statute necessarily involves exclusion of other things not expressed. . . .” ’ ” (*People v. Whitmer* (2014) 230 Cal.App.4th 906,

917.) By making the definition in subdivision (d) of section 667 applicable only to subdivisions other than subdivision (a), the electorate signified that the subdivision (d) definition may not apply to subdivision (a) or, in other words, that a juvenile adjudication cannot be a "conviction" for purposes of section 667(a)(1).

Arguing ineffective assistance of counsel is notoriously difficult on direct appeal. When deciding ineffective assistance claims, reviewing courts employ a "strong presumption" that counsel's performance was adequate. (*Strickland v. Washington* (1984) 466 U.S. 668, 689-690 (*Strickland*); *People v. Leonard* (2014) 228 Cal.App.4th 465, 484.) They also view the actions of counsel in the context of the facts available to him or her at the time rather than in hindsight. (*Strickland*, at p. 680; *In re Valdez* (2010) 49 Cal.4th 715, 729-730.) " '[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected." (*People v. Wilson* (1992) 3 Cal.4th 926, 936.) Consequently, claims like the one petitioner makes "are often more appropriately litigated in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

Here, counsel for petitioner in this habeas proceeding filed a declaration attesting to his communication with petitioner's trial counsel. According to the former, the latter admitted not knowing about the holding in *West* and promised to sign a declaration to that effect. He later reneged and refused to sign the affidavit counsel on the writ had

prepared. However, it is still the case that the only evidence before this court shows that trial counsel did, in fact, perform deficiently. He had no valid tactical reason for not objecting when the trial court announced its intention to impose a section 667(a)(1) enhancement using the juvenile adjudication for carjacking. Moreover, the People concede the merits of this conclusion in their informal response. They admit that, since petitioner's juvenile adjudication for carjacking is not a "conviction," it could not have been used to enhance his sentence under section 667(a)(1). We need not, and do not, defer to counsel's professional judgment when it appears no judgment was actually exercised given his admitted misunderstanding of the law. Instead, we find counsel's performance with respect to the carjacking prior was deficient.

Having demonstrated that counsel committed an error in representing his client at sentencing, petitioner must next prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Cooper*, *supra*, 53 Cal.3d at pp. 831-832, citing *Strickland*, *supra*, 466 U.S. at pp. 687-688 & *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

Although the People concede that the juvenile adjudication for carjacking could not support a section 667(a)(1) enhancement, they do not concede that counsel's failure to point this out to the trial court constituted ineffective assistance. Instead, they ask us to set an evidentiary hearing regarding why this court should not grant petitioner the relief he seeks. In this case, petitioner easily surmounts the prejudice hurdle. Had counsel

informed the trial court that a juvenile adjudication may not be used to support an enhancement for having a prior serious felony "conviction" (§ 667(a)(1)), petitioner's sentence would be five years shorter.

For the foregoing reasons, petitioner has shown both that counsel committed an error in judgment at sentencing and that this error prejudiced him. The petition must therefore be granted.

DISPOSITION

Accordingly, the petition for writ of habeas corpus is granted. The Superior Court of Riverside County is directed to vacate the portion of petitioner's sentence that imposed a five-year enhancement pursuant to section 667(a)(1). The sentence is to otherwise remain intact.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.